FILED

(1)

No. 931882 MAY 25 1994

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

OCTOBER TERM, 1993

NORMAN W. SWANSON, et al.,
Class A Petitioners,

and

CHARLES L. BERRY, et al.,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields III
Lawrence Pierce Egerton
Kimberly C. Stevens
WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

***Counsel of Record**
May 23, 1994

Attorneys for Petitioners

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

30 pp

QUESTION PRESENTED

Whether North Carolina provided a clear and certain remedy to federal retirees and active duty military personnel who paid state income taxes that were illegal and unconstitutional under 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

PARTIES TO THE PROCEEDING

The Petitioners are: 394 named Class A Petitioner Plaintiffs and approximately 93,455 certified class members who paid state income taxes on their federal pensions; and, seven named Class B Petitioner Plaintiffs and approximately 49,479 certified class members, who are federal active duty and reserve military personnel, who paid state income taxes on their military compensation. The Respondents are: the State of North Carolina, the Secretary of the North Carolina Department of Revenue, the Department of Revenue and the Treasurer of the State of North Carolina. (A list of named Petitioners and Respondents appears in App. DD).

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS .. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

1. North Carolina's exclusive post-deprivation tax refund statute denies federal retirees and active duty military personnel a clear and certain remedy. 13

2. In failing to give preclusive effect to a prior federal district court order, the court below violated principles of federalism and supplanted federal preclusion law with its own definition of collateral estoppel 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES:

Age Int'l, Inc. v. Miller
830 F. Supp. 1484 (N.D. Ga. 1993) 24
Atchison, Topeka & Santa Fe Railway Co. v. O'Connor
223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912) 13
Avondale Shipyards, Inc. v. Insured Lloyd's
786 F.2d 1265 (5th Cir. 1986) 24
Bailey v. State
330 N.C. 227, 412 S.E.2d 295 (1991) 4, 20
Barker v. Kansas
503 U.S. ___, 112 S. Ct. 1619, 118 L. Ed. 2d 243 (1992) 7
Bass v. South Carolina
509 U.S. ___, 113 S. Ct. 3025, 125 L. Ed. 2d 714 (1993) 3
Block v. U.S. International Trade Commission
777 F.2d 1568 (Fed. Cir. 1985) 24
Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation
402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971) 23
Bob Jones University v. Simon
416 U.S. 725, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) 15
Boston Edison Co. v. Federal Power Commission
557 F.2d 845 (D.C. Cir. 1977) 17
Brinkerhoff-Faris Trust & Savings Co. v. Hill
281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) 16, 18, 19
Brumley v. Utah State Tax Commission
868 P.2d 796 (Utah 1993, amended January 13, 1994) 20
Cambridge State Bank v. James
___ N.W.2d ___, 1994 WL 106516 (Minn. 1994) . . 21

Coca-Cola v. Coble
293 N.C. 565, 238 S.E.2d 780 (1977) 4, 16, 20
Corum v. University of N.C.
330 N.C. 761, 413 S.E.2d 276, *cert. denied*, ___ U.S. ___, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992) 21
Cox v. Louisiana
379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965) 17
Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.
120 U.S. 141, 7 S. Ct. 472, 30 L. Ed. 614 (1887) ... 22
Davis v. Michigan Dept. of Treasury
489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) ..... *Passim*
Deposit Bank v. Frankfort
191 U.S 499, 24 S. Ct. 154, 48 L. Ed. 276 (1903) 22, 25
Dodge v. Osborn
240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557 (1916) 15
Duffy v. Wetzler
509 U.S. ___, 113 S. Ct. 3027, 125 L. Ed. 2d 716 (1993) 3
Dyndul v. Dyndul
620 F.2d 409 (3rd Cir. 1980) 23, 24
Eastern Carolinas Broadcasting Co. v. Federal Communications Commission
762 F.2d 95 (D.C. Cir. 1985) 17
Employees Own Federal Credit Union v. City of Defiance, Ohio
752 F.2d 243 (6th Cir. 1985) 24
Felder v. Casey
487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) 20
Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n
804 F.2d 390 (7th Cir. 1986) 24
Hagge v. Iowa Dept. of Revenue and Finance

504 N.W.2d 448 (Iowa 1993) 20
Harper v. Virginia Dept. of Taxation
509 U.S. ___, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) ..... *Passim*
Hillsborough v. Cromwell
326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946) 20
In re Hawaiian Flour Mills, Inc.
868 P.2d 419 (Hawaii 1994) 21
John Morrell & Co. v. Local Union 304A
913 F.2d 544 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991) 24
Joint Anti-Fascist Comm. v. McGrath
341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951) 13
Kirkpatrick v. Currie
250 N.C. 213, 108 S.E.2d 209 (1959) 18, 20
Lewy v. Virginia Dept. of Taxation
509 U.S. ___, 113 S. Ct. 3024, 125 L. Ed. 2d 713 (1993) 3
Londoner v. Denver
210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908) 19
Luben Industries, Inc. v. United States
707 F.2d 1037 (9th Cir. 1983) 24
Lummus Co. v. Commonwealth Oil Refining Co.
297 F.2d 80 (2nd Cir. 1961), *cert. denied*, 368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1962) 24
Marx v. Broom
632 So.2d 1315, 1994 WL 52850 (Miss. 1994) 21
Mathews v. Eldridge
424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 13, 25
McKesson v. Division of Alcoholic Beverages and Tobacco
496 U.S. 18, 110 S. Ct. 2238, 1101 L. Ed. 2d 17 (1990) ..... *Passim*

McKnett v. St. Louis & S. F. Railway Co.
292 U.S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934) 20
Miller Brewing Co. v. Joseph Schlitz Brewing Co.
605 F.2d 990 (7th Cir. 1979) 23
Montana National Bank of Billings v. Yellowstone County
276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928) 16
Myers v. International Trust Co.
263 U.S. 64, 44 S. Ct. 86, 68 L. Ed 165 (1923) 22
North Georgia Finishing Co. v. Di-Chem
419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975) 13
Norwest Bank Duluth v. McClung
509 U.S. ___, 113 S. Ct. 3026, 125 L. Ed. 2d 714 (1993) 3
O'Reilly v. Malon
747 F.2d 820 (1st Cir. 1984) 24
Parsons Steel, Inc. v. First Alabama Bank
474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986) 22
Phillips v. Commissioner
283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931) 15
Pickett v. Brown
462 U.S. 1, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983) 20
Raley v. Ohio
360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959) 17
Reich v. Collins
263 Ga. 602, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, ___ U.S. ___, 114 S. Ct. 1048, 127 L. Ed. 2d 370 (Ga. Feb. 22, 1994) 3, 11
Reich v. Collins
509 U.S. ___, 113 S. Ct. 3028, 125 L. Ed. 2d 717 (1993) 3

Republic Pictures Corporation v. Kappler
151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757, 66 S. Ct. 523, 90 L. Ed. 991 (1946) 20
Rosewell v. LaSalle Nat'l Bank
450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981) 25
Sheehy v. Montana Dept. of Revenue
509 U.S. ___, 113 S. Ct. 3025, 125 L. Ed. 2d 713 (1993) 3
Stoll v. Gottlieb
305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938) 22
Strelecki v. Oklahoma Tax Commission
1993 WL 379008, ___ P.2d ___ (Okla. 1993), *opinion on reh'g*, 1994 WL 102224 (Okla. 1994) ... 20
Swanson v. Powers
No. 89-282-CIV-5-H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 871, 116 L. Ed. 2d 777 (1992) 7, 20
Swentek v. USAir, Inc.
830 F.2d 552 (4th Cir. 1987) 24
United States v. Clegg
846 F.2d 1221 (9th Cir. 1988) 17
United States v. Duggan
743 F.2d 59 (2nd Cir. 1984) 17
United States v. Durrani
835 F.2d 410 (2nd Cir. 1987) 17
United States v. Pennsylvania Industrial Chemical Corp.
411 U.S. 655, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973) 17
United States v. Rosenthal
793 F.2d 1214 (11th Cir.) *modified on other grounds*, 801 F.2d 378 (11th Cir.), *cert. denied*, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987) 17

Watkins v. Resorts Intern. Hotel & Casino
591 A.2d 592 (N.J. 1991) 22

STATUTES OF THE UNITED STATES:

4 U.S.C. § 111 ..... 2, 7, 9
28 U.S.C. § 1257(a) 2
28 U.S.C. § 1291 23
28 U.S.C. § 1292(b) 24
42 U.S.C. § 1983 7

STATUTES OF NORTH CAROLINA:

N.C. Gen. Stat. § 14-1.1(a)(9) 14
N.C. Gen. Stat. § 105-236(4) 14
N.C. Gen. Stat. § 105-236(5) 14
N.C. Gen. Stat. § 105-236(6) 14
N.C. Gen. Stat. § 105-236(7) 14
N.C. Gen. Stat. § 105-239 14
N.C. Gen. Stat. § 105-241.1 14
N.C. Gen. Stat. § 105-241.3 14
N.C. Gen. Stat. § 105-242 14
N.C. Gen. Stat. § 105-266.1 ..... *Passim*
N.C. Gen. Stat. § 105-267 ..... *Passim*

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV § 1 ..... *Passim*

In The
Supreme Court of the United States
October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners, and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Classes A and B, as certified by the trial court, hereby petition this Court for writ of *certiorari* to the Supreme Court of North Carolina.

OPINIONS BELOW

The trial court's opinion awarding full refunds to Plaintiffs is unpublished and appears at Appendix B. The original opinion in the Supreme Court of North Carolina is reported at 407 S.E.2d 791 (N.C. 1991) and appears at Appendix C. The opinion on rehearing is reported at 410 S.E.2d 490 (N.C. 1991) and appears at Appendix D. This Court's opinion granting *certiorari* and vacating the judgment of the Supreme Court of North Carolina is reported at 113 S. Ct. 3025 (1993). The opinion of the Supreme Court of

North Carolina on remand from this Court is reported at 441 S.E.2d 537 (N.C. 1994) and appears at Appendix A.

JURISDICTION

On remand from this Court, the Supreme Court of North Carolina issued its opinion reversing the trial court's judgment for Petitioners on March 4, 1994. (App. A). Judgment on the Supreme Court of North Carolina's opinion was entered March 24, 1994. This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Due Process Clause** of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title **4 U.S.C. § 111** provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal services as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

North Carolina General Statute **§ 105-267**. (App. GG).

North Carolina General Statute **§ 105-266.1**. (App. GG).

STATEMENT OF THE CASE

For forty-eight years, North Carolina discriminated against federal employees in taxing their retirement benefits. By 1989, so did twenty-two other states, costing federal retirees hundreds of millions of dollars annually. In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), this Court held such discrimination unconstitutional. Three states subsequently afforded retroactive relief. Twenty states refused. (App. CC). This Court then granted *certiorari* in *Harper v. Virginia Dept. of Taxation*, proclaimed *Davis* retroactive and ordered "meaningful backward looking relief" which "create[s] in hindsight a nondiscriminatory scheme" absent a pre-deprivation remedy. 113 S. Ct. 2510, 2519-20 (1993). Thereafter, this Court remanded this and six other cases in light of *Harper*.[1]

After *Harper*, fifteen states dutifully gave refunds or settled their lawsuits. Five states remain, desperately clinging to the fruits of their unconstitutional actions. (App. CC). Due to the state's gamesmanship which stymied enforcement of federal constitutional rights, Georgia federal retirees sought *certiorari* in *Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, 114 S. Ct. 1048 (Ga. Feb. 22, 1994). That petition addresses various procedural tactics Georgia disingenuously terms "an adequate pre-deprivation remedy." Petitioners present the flip-side: North Carolina concedes unconstitutional taxation with no pre-deprivation remedy, but insists that an onerous post-deprivation procedural quagmire somehow constitutes even-handed "meaningful backward looking relief" which "creates in hindsight a nondiscriminatory scheme."

---

[1] *Lewy v. Virginia Dept. of Taxation*, 113 S. Ct. 3024 (1993); *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dept. of Revenue*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth v. McClung*, 113 S. Ct. 3026 (1993); *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, 113 S. Ct. 3028 (1993).

North Carolina's exclusive "post-deprivation remedy" is N.C. Gen. Stat. § 105-267 ("Section 267"), which read in conjunction with N.C. Gen. Stat. § 105-266.1 ("Section 266.1") facially allows taxpayers to obtain refund of unconstitutional taxes sought within three years of payment.[2] Yet, as applied, these statutes scarcely resemble their language.

The court below determined that to challenge an unconstitutional tax in North Carolina, a taxpayer must, within thirty days after paying the tax, make a demand on the North Carolina Department of Revenue ("Department"), wait ninety days for the preordained denial (the Department is prohibited from deciding constitutional issues, thus requiring denial of the demand[3]), and then, and *only* then, file a lawsuit against the state. (App. A, pp. 9-10). Class demands are prohibited. Each class member must individually comply with Section 267. (App. A, pp. 8-9).[4] Justice Mitchell in dissent decried the majority's holding as "an unseemly result," and declared Section 267, as applied, "a sham procedure . . . futile from the outset in this case," which "tilt[ed] the scales too far in favor of the taxing entity and den[ied] these taxpayers fundamental due process." (App. A, p. 25).

But the story gets worse. The Department sent each Petitioner tax instructions for 1985 through 1988, stating that taxpayers had three years -- not thirty days -- to request refunds. (App. L).

---

[2]Section 267 can be read only to (1) require payment before contesting a tax; (2) acknowledge that payment of the tax is without prejudice; and (3) provide means for obtaining a refund without litigation.

[3]*Coca-Cola v. Coble*, 238 S.E.2d 780, 782-83 (N.C. 1977). This case also held Section 266.1 inapplicable to overpayments due to an unconstitutional tax. Therefore, taxpayers who overpay because of inadvertence or agency misinterpretations are afforded broader relief than those taxed unconstitutionally.

[4]*See also Bailey v. State*, 412 S.E.2d 295, 301 (N.C. 1991) ("[A]lthough N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class, it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others").

Through tax year 1993, the tax instructions remain unchanged. (App. N). The Department also printed tax bulletins for 1985 through 1988 repeating that refunds were available for three years after filing and again omitting the thirty-day demand rule. (App. M). The result: taxpayers were *affirmatively misled.*[5]

Significantly, the state did not use refund demands as a tool for fiscal planning. Information obtained from such demands was not maintained, much less provided to legislative officials for consideration in the budget process. (App. W, p. 191). Thus, as applied, the demand rule only functioned to limit refund of wrongfully imposed taxes to diligent students of the law who were extremely persistent in their efforts to recover sums often exceeded by litigation costs.[6]

The Department's inconsistent conduct after *Davis* created confusion and further restricted access to post-deprivation relief. Department officials told some taxpayers to pay immediately or face "heavy penalties," some to "do nothing," and some to file an amended return. None were told about a thirty-day demand rule. (App. Y, pp. 214-16, 221-23; App. X).

On April 10, 1989, the Attorney General advised the Department that taxpayers seeking refunds must comply with the thirty-day demand rule *and* that taxpayers did not have to pay the unconstitutional taxes. (App. O, pp. 158-59). This opinion contained no specific form or content requirements for refund demands, but advised that a statement challenging the tax and

---

[5]Judge Howard, United States District Judge for the Eastern District of North Carolina, noted, in a companion federal action: "[Section 267] is uncertain because of the conduct of . . . the Department. . . . All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any* request for refund may be made within three years of payment." (App. G, p. 72) (emphasis in original).

[6]In South Carolina, counsel estimated that individually litigating each refund claim would have cost more than $38 million in filing fees alone. (App. AA).

demanding a refund would suffice. (App. O, p. 159). On April 13, 1989, Respondents announced in a single press release of unknown circulation, just four days before the 1988 tax filing deadline, that demands for refund of unconstitutional taxes had to be made within thirty days after payment *and omitted* the Attorney General's advice that such tax need not be paid in the first place. (App. P, p. 160). Many Petitioners had already paid their taxes more than thirty days before the newly announced requirements.[7] Still others paid afterward, unaware they did not need to pay.

Although they decided to begin enforcing Section 267 (having previously been unaware that it was the exclusive means for contesting an unconstitutional tax[8]), Department officials could not accurately determine the date from which the thirty-day period was measured,[9] they did not know what constituted a sufficient demand

---

[7]The Secretary of Revenue stated: "For those federal retirees who filed their returns early . . ., none of them anticipated the Supreme Court decision by filing timely claims for refund, and of course . . . it was too late to do so. It is, understandably, these taxpayers who have been the most upset . . . ." (App. T).

[8]The Secretary of Revenue for the tax years in question testified she first learned of Section 267 "when this case [*Swanson*] came up." (App. V, pp. 188-89). The Assistant Director of Compliance Examination Programs testified he was not aware of the thirty-day rule as of *Davis*. He learned of Section 267 from the Attorney General's advice on the effect of *Davis*. (App. V, pp. 182-83). The Administrative Officer in the Individual Income Tax Division testified that while he was aware of Section 267, it had never been used before *Davis* nor had he advised anyone about a demand rule. (App. V, pp. 184-85).

[9]Judge Howard found: "A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim." (App. G, p. 72). Department officials testified "the date [a return is received] is not significant to the department." (App. V, pp. 184, 186-87). Also, Section 267 allows differing interpretations as to when "payment" occurs, the critical event identifying when demand is due. Literally, the statute could require separate "demands" after each tax withholding.

letter,[10] and they were not internally equipped to respond to such demands within ninety days. Even after adopting various policies regarding the thirty-day demand rule, the Department did not provide refunds to all the people who just happened to comply with the newly adopted "rules."[11]

Following *Davis*, Petitioners filed two lawsuits. They first filed in federal court, seeking *inter alia*, injunctive and declaratory relief and damages under 42 U.S.C. § 1983. *Swanson v. Powers*, No. 89-282-CIV-5-H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).[12] Class B Petitioners later joined as additional plaintiffs.[13] Immediately after

---

Alternatively, "payment" could occur the date the tax is due. Other constructions are possible. Not only did the Department and the courts fail to provide guidance on this key date, but also the Department only adopted an internal policy after *Davis*. (App. W, p. 193).

[10]The Secretary of Revenue was asked if she understood the requirements for a demand letter after the Attorney General's April 10, 1989 opinion, and stated "[n]o, sir. I did not." (App. V, p. 189).

[11]Some Petitioners demanded refunds within thirty days of payment but received neither response nor refunds from the Department within ninety days. For example, Mr. Roe filed his amended return on February 28, 1989 and received no response denying his refund until September 13. (App. Y, pp. 201-05). Mr. Wagner filed his return on April 10, 1989, and filed his amended return on April 29 demanding a refund; on October 10, the Department wrongfully denied his claim. (App. Y, pp. 208-09). Mr. Loudermilk paid his taxes on April 1, 1989, filed his amended return April 8, and was wrongfully denied a refund on September 28. (App. Y, pp. 210-13).

[12]After that suit was filed, the North Carolina legislature, on August 12, 1989, purported to abolish the discriminatory tax scheme as to Class A Petitioners for tax year 1989. N.C. Sess. Laws 1989 (Reg. Sess. 1989) ch. 792. (App. BB, p. 237).

[13]Class B Petitioners are federal active duty and reserve military personnel who did not receive a $1,500 tax exemption given National Guardsmen. *Barker v. Kansas*, 112 S. Ct. 1619 (1992) held military personnel are within the ambit of 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. After Class

the federal suit began, the district court issued a conditional order certifying the original class (now Class A) to make such demand as "may be required to obtain income tax refunds . . . ." (App. F, p. 63). Class demands were made. (App. K, pp. 95-104).

Faced with the demands, and lacking an established procedure for considering them, the Department imposed new requirements as to the form and content of the demands which appeared nowhere in the statute or administrative code. (App. I, p. 90). These requirements were completely unnecessary to consider Petitioners' demands[14] (which, of course, the Department had to deny anyway). After a lengthy wait, the Department refused to honor not only Petitioners' claims for 1985 through 1987 taxes, but also Petitioners' "timely-filed" class refund claims for 1988 taxes unlawfully exacted after *Davis*. (App. I).

After both classes were certified for all purposes, Respondents moved to dismiss the federal lawsuit under the Tax Injunction Act and principles of comity. Following substantial discovery establishing the Department's inability to administer Section 267,

---

B was added, the legislature repealed the exemption for National Guardsmen for tax year 1990. N.C. Sess. Laws 1989 (Reg. Sess. 1990) ch. 1002 (entitled "An Act to Conform the Laws of North Carolina to the Requirements of Certain Federal Laws and Constitutional Principles"). (App. BB, p. 236).

[14]The Administrative Officer in the Individual Income Tax Division of the Department testified that, "it was not a requirement to have all the figures . . . in the letter or to even include their Social Security number. As long as we could identify the taxpayer and they were requesting that refund of taxes paid, then we would consider that a claim." (App. V, p. 186). Furthermore, as early as April 26, 1989, Respondents obtained from the federal government, as to civilian federal retirees most, if not all, of the information sought by these "surprise regulations." (App. V, p. 183; App. R). The federal government also made available to all states data on United States military personnel pay records, including retired personnel. North Carolina failed to obtain such information. (App. R, p. 171-72). Respondents, thus, had no need for any of the information required of Petitioners. Everything required but the taxpayer's name was superfluous, and the names of federal retirees were readily available from the federal government.

the district court made appropriate factual findings, held that Section 267 *as applied* was not a plain, speedy, efficient, clear, certain, adequate or complete remedy, and denied the motion to dismiss. (App. G, pp. 71-74, 78). The State did not appeal these findings.[15]

Petitioners also filed in state court for refund of 1985 through 1988 taxes for Class A and 1986 through 1989 taxes for Class B. The trial court conditionally certified the classes for the purpose of making refund demands. (App. E, pp. 55-56). These class demands were made and rejected. (App. K, p. 105-09; App. I, p. 91-92). Thereafter, the trial court certified both classes for all purposes. (App. E, pp. 57-61). The trial court later entered summary judgment for both classes, ordering refunds with interest. (App. B). Respondents appealed. The North Carolina Supreme Court reversed, holding that *Davis* was not retroactive, and remanded the case to the trial court for dismissal. (App. C). On rehearing, state law claims which were addressed neither by the trial court nor in the previous opinion were also ordered dismissed. 410 S.E.2d 490 (N.C. 1991). (App. D). Petitioners sought *certiorari* from this Court on March 4, 1992. On June 28, 1993, this Court granted *certiorari*, vacated the decision of the state court and remanded for reconsideration in light of *Harper*.[16]

---

[15]The State did recently ask the federal court to reconsider its ruling. The court received briefs, heard oral arguments, and again denied the State's motion to dismiss on these grounds. (App. H, pp. 81-82). The federal court nonetheless dismissed the retirees' federal action, finding itself collaterally estopped by the state court's decision. (App. H, p. 83, 88). A motion for reconsideration has been filed.

[16]Petitioners filed, in their state court complaint, claims for relief for violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, 4 U.S.C. § 111, and the doctrine of intergovernmental tax immunity. (App. EE). Both in the initial brief in the North Carolina Supreme Court and the brief on remand from this Court, Petitioners raised and argued the federal constitutional claims which are presented to this Court.

On remand, a majority of the North Carolina Supreme Court found Petitioners' refund claims barred by Section 267's thirty-day demand rule. The majority spoke directly only to the facial validity of Section 267. It ignored without comment Petitioners' arguments that, *as applied* here, the statute is unconstitutional (and also ignored similar conclusions by Justices Mitchell and Parker in dissent). It acknowledged, but refused to apply, the federal court's earlier rulings and, even more startlingly, did not address the merits of the factual determinations by the federal court.[17]

The result is *no* remedy for over 90,000 federal retirees and almost 50,000 federal active duty and reserve military personnel without explanation as to how the "demand and wait" rule provides the "plain, speedy, efficient, clear, certain and adequate" remedy the federal court found lacking and is anything other than a "sham procedure . . . futile from the outset" (App. A, p. 25) which has allowed the state to "pick [its] taxpayer[s'] pocket[s]" and keep "the money when it [was] caught doing so." (App. C, p. 47).

REASONS FOR GRANTING THE PETITION

This case raises a question of substantial public importance concerning taxes collected in violation of the Constitution and statutes of the United States. In the wake of *Harper* and this Court's prior remand of this case, efforts to deny relief under constitutionally deficient state remedies and burdens imposed upon federal rights are at the forefront of certain states' continuing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515.

---

[17]Both in the initial brief in the North Carolina Supreme Court and the brief on remand from this Court, Petitioners argued that the court below was bound, under the doctrine of collateral estoppel, by the prior federal district court order lifting the jurisdictional bar of the Tax Injunction Act.

This Court went to great lengths in such cases as *Davis*, *Harper* and *McKesson*[18] to establish clearly a taxpayer's right to freedom from discriminatory taxation. Yet, five states are, thus far, testing this Court's resolve by employing state procedural obstacles to deny relief to affected taxpayers. With hundreds of millions of dollars at stake in each state, any procedural scheme that ultimately avoids *Harper's* mandate will become the model for other states. This potential result has far-reaching consequences that eclipse the impact on Petitioners and federal retirees generally. The mandates of *Davis* and *Harper* are not limited to federal retirees. Likewise, state tax refund remedies -- particularly exclusive post-deprivation remedies -- must create incentives for constitutionally sound tax laws. Otherwise, taxpayers are, for practical purposes, limited to prospective relief when a tax is ruled unconstitutional, notwithstanding *Harper's* retroactivity mandate. As a corollary, states retain the hundreds of millions of dollars unconstitutionally collected before and during the litigation challenging the tax.

In a related case from Georgia (*Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, 114 S. Ct. 1048 (Ga. Feb. 22, 1994)), this Court is reviewing the adequacy of a *pre-deprivation* remedy and will articulate such standards as it deems important in that context. The present case affords a similar opportunity with respect to *post-deprivation* relief. Ironically, this Court's ruling, in *Reich*, addressing the favored remedy, will have little effect if North Carolina's post-deprivation scheme is not also addressed. Indeed, a state would be foolish to provide any pre-deprivation remedy if North Carolina's experience is viewed as acceptable relief. *Taken together*, *Reich* and this case offer this Court an opportunity to fully address the constitutional requirements for state pre-deprivation *and post-deprivation* remedies when confronted with unconstitutional taxes.

---

[18] *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

The competing state and federal interests presented are clear. The state interest lies in orderly regulation of its budget and fiscal policies.[19] The federal interest lies in enforcing the Constitution and acts of Congress prohibiting discriminatory taxes. The extent to which a state non-discriminatorily taxes its citizens and how it spends money is a political decision left to state government. On the other hand, whether each individual's property rights are preserved against illegal taking through due process of law is a federal matter, controlled by this Court's unbiased interpretation of constitutional principles and federal law.

A federal district court held North Carolina's remedial scheme so inadequate that the extreme deference to states in the tax area did not outweigh the federal interests at issue. Yet, in contravention of principles of federalism, the court below evaded the federal district court order by applying state rather than federal preclusion law and then totally ignored the merits of the issues addressed in the order. Only this Court can uphold the sanctity of the federal court's order and, more importantly, uphold the sanctity of this Court's own mandates in *Davis*, *Harper* and *McKesson*.

Petitioners respectfully submit that North Carolina's application of its post-deprivation remedy should not become the model for others; that North Carolina should not be the lone state which escapes this Court's rulings in *Davis* and *Harper*; and that granting *certiorari* in this case will allow this Court to ensure that state

---

[19]Respondents claim that the financial impact on the state of ruling in Petitioners' favor justifies the demand rule, as applied. If, to any extent whatever, such financial impact may be an issue, the facts should be considered in their entirety. Petitioners' entire annual claim is estimated at less than four-tenths of one percent of the state's annual budget. Recently, North Carolina's Governor announced a "surplus of nearly a billion dollars." (App. Z, p. 233-34). In 1992 alone, just one federal agency (the Department of Defense) spent over six billion dollars on non-pay purchases in North Carolina. (App. Z, p. 231). In 1989 alone, the federal payroll in North Carolina was over three billion dollars. (App. Z, p. 232). In 1989, the federal government made contracts with North Carolina businesses in excess of one billion dollars. (App. Z, p. 232).

remedies are applied to encourage constitutional taxation, federal orders are respected and this Court's mandates remain the law of the land.

1. North Carolina's exclusive post-deprivation tax refund statute denies federal retirees and active duty military personnel a clear and certain remedy. Due Process requires notice and an opportunity to be heard *before* a citizen is deprived of property. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951).[20] While certain exceptions are recognized based upon exigent circumstances or in balancing other governmental interests, this Court still requires post-deprivation procedural safeguards in order to protect citizens from unconstitutional takings. *McKesson*, 496 U.S. at 36.[21]

In the context of state taxation with no pre-deprivation remedy, as in North Carolina, such procedural safeguards must provide not only "a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy." *McKesson*, 496 U.S. at 39.[22] When the tax is unlawfully discriminatory, a post-deprivation remedy must accord taxpayers

---

[20]"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner . . . .'" *McKesson*, 496 U.S. at 39 n.22 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Yet, the court below held that Petitioners were not entitled to a hearing, even *after* their property was unconstitutionally taken, due to Petitioners' failure to comply with the dictates of Section 267.

[21]*See* for example *North Georgia Finishing Co. v. Di-Chem*, 419 U.S. 601 (1975) (delineating procedural due process requirements where a state fails to give a debtor a hearing before attachment or garnishment of his property).

[22]*See also Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285 (1912) ("It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy").

"meaningful backward-looking relief to rectify any unconstitutional deprivation. . . . In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some order that create[s] in hindsight a nondiscriminatory scheme." *Harper*, 113 S. Ct. at 2519-20 (citations and internal quotations omitted).

Under the holding below, the only "remedy" available to Petitioners who paid the discriminatory taxes under "constitutionally significant duress"[23] is Section 267. As applied here, however, Section 267 amounts to no remedy at all because of (1) North Carolina's futile "demand and wait" procedural bar to relief under this statute,[24] (2) affirmatively misleading instructions provided by the Department which failed to apprise Petitioners that this statute was their exclusive remedy and identified three years as the only temporal restriction upon access to refunds, (3) the

---

[23]"[W]hen a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under `duress' in the sense that the state has not provided a fair and meaningful predeprivation procedure." *McKesson*, 496 U.S. at 39 n.21. In North Carolina, an attempt to evade payment of income tax is a Class I felony with a possible sentence of 5 years and/or a $25,000.00 fine. N.C. Gen. Stat. §§ 105-236(7), 14-1.1(a)(9). In addition, penalties include 10% for failure to pay income tax, 10% or 25% for negligence, and 25% if fraud is involved. N.C. Gen. Stat. § 105-236(4), (5) and (6). Unpaid taxes bear interest at a rate, as determined by the Secretary of Revenue, between 5% and 16%. N.C. Gen. Stat. § 105-241.1. Unpaid assessed taxes are subject to execution upon real and personal property and garnishment of wages and income. N.C. Gen. Stat. § 105-242. The Secretary may bring a civil action to collect taxes at any time. N.C. Gen. Stat. § 105-239. To contest an assessment in the judicial branch, other statutes require payment of the tax or a bond. N.C. Gen. Stat. § 105-241.3. Any suit by the taxpayer must then be brought pursuant to Section 267. Thus, in North Carolina, taxes are paid under "constitutionally significant duress." *See Harper*, 113 S. Ct. at 2520 n.10 (citations omitted).

[24]Section 267 does not contain a "short statute of limitations," a "protest" requirement or a "timely notice" provision for the purpose of fiscal planning as referred to in *McKesson*, 496 U.S. at 45. The effect of Section 267's futile administrative review procedure, especially given the required ninety-day wait, far exceeds both the purposes and effects of the provisions envisioned by *McKesson*.

interpretation of Section 267 as the exclusive remedy available to Petitioners, despite express statutory language providing an alternative, (4) the rejection of class demands, thus requiring each taxpayer to individually run the maze of misleading information and comply fully with all "details" of the futile "demand and wait" rule, (5) the application of previously unannounced administrative barriers to Petitioners' efforts to comply with Section 267's procedural aspects, and (6) North Carolina's *de facto* denial of retroactive effect to *Davis* despite *Harper*. Individually, and especially in combination, these deficiencies preclude the relief mandated by this Court.

The fundamental error by the majority below was its confusion of some theoretical remedy with a "clear and certain" remedy sufficiently swift and accessible to require return of unlawfully taken property as early as practicable.[25] North Carolina could have provided such a remedy to Petitioners by empowering the Department to promptly conduct hearings and provide refunds to taxpayers challenging the constitutionality of the state's tax laws.[26] Perhaps, North Carolina could have provided such a remedy by providing taxpayers early and direct access to its courts. North Carolina might even have provided such a remedy by allowing access to its courts conditioned only upon some sort of notice designed to allow its agencies and legislature to plan for potential adverse outcomes. *McKesson*, 496 U.S. at 44-45. What it could not do was impose limitations upon taxpayer remedies which functioned merely to discourage the pursuit of refund claims and make obtaining relief difficult or unlikely.

---

[25]*See McKesson*, 496 U.S. at 36 n.17 and cases cited therein.

[26]*See Bob Jones University v. Simon*, 416 U.S. 725, 746 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931); *Dodge v. Osborn*, 240 U.S. 118 (1916).

Neither the "demand" nor the "wait" served any useful purpose, except to block access to the courts. This *futile* procedural bar to suit became even more unreasonable when interpreted to require that each individual taxpayer comply with all announced and unannounced regulations. Taxpayers are not required to resort to futile procedures to obtain relief from unconstitutional taxation. Such procedures violate the Due Process Clause. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928).[27]

Justices Mitchell and Parker, in dissent below, recognized the inherent futility here: "[T]he opinion of the majority in the present case goes well beyond any legitimate need supporting [fiscal] concerns and upholds a sham procedure for postdeprivation relief which was futile from the outset in this case. Surely, this unseemly result may only be properly characterized as tilting the scales too far in favor of the taxing entity and denying these taxpayers fundamental due process." (App. A, p. 25).

Even worse, Petitioners were continually assured by the Department that they had three years to request a tax refund. Such pronouncements are no surprise since senior Department officials were unaware of any shorter time requirement before *Davis*.

---

[27]In *Montana*, this Court held: "Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the Rogers Case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision." 276 U.S. at 515. Likewise, the Supreme Court of North Carolina's decision in *Coca-Cola* rendered any demand for refund to the Department utterly futile since that department is powerless to grant Petitioners appropriate relief.

Nonetheless, to permit the Department to reverse course[28] and bar refund claims based on failure to comply with the uncharted waters of Section 267's "demand and wait" rule, despite the Department's affirmative representations that Petitioners had three years to seek refunds, also violates the Due Process Clause. A state cannot punish an individual who, in good faith,[29] relies upon interpretation of the law by those officials responsible for its administration. *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).[30]

---

[28]"[A]brupt changes in discretionary agency practice or interpretation require some degree of notice, if possible, when the change threatens to penalize parties for reasonable reliance on the prior practice." *Eastern Carolinas Broadcasting Co. v. Federal Communications Commission*, 762 F.2d 95, 101 (D.C. Cir. 1985). *See also Boston Edison Co. v. Federal Power Commission*, 557 F.2d 845. 846 (D.C. Cir. 1977) ("Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect").

[29]In fact, this Court presumes that the violation of law was caused by the erroneous advice of the officials. *Raley v. Ohio*, 360 U.S. 423, 439 (1959).

[30]*See also United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("traditional notions of fairness inherent in our system of criminal justice" prevent the government with proceeding with a prosecution under a statute when the defendant reasonably relied on regulations issued under authority of the statute permitting performance of the charged acts); *United States v. Clegg*, 846 F.2d 1221, 1223 (9th Cir. 1988) (good faith reasonable reliance on the apparent authority of government officials is a defense); *United States v. Durrani*, 835 F.2d 410, 422 (2nd Cir. 1987) (legitimate reliance on an official interpretation of the law is a defense); *United States v. Rosenthal*, 793 F.2d 1214, 1235 (11th Cir.) (legitimate reliance on an official interpretation of the law is a defense), *modified on other grounds*, 801 F.2d 378 (11th Cir.), *cert. denied*, 480 U.S. 919 (1987); *United States v. Duggan*, 743 F.2d 59, 83 (2nd Cir. 1984) (although there are few exceptions to the rule that ignorance of the law is no excuse, there "is an exception for legitimate reliance on official interpretation of the law").

This due process violation is exacerbated when review of the statutory scheme fails to reveal the exclusivity of such procedural requirements. A plain reading of North Carolina's tax scheme does not even suggest that Section 267 is the exclusive remedy for unconstitutional taxation. Section 266.1 provides that "[a]ny taxpayer may apply . . . for refund of tax . . . paid by him at any time within three years after the date set by the statute for the filing of the return . . . ." Section 266.1(e) provides that "the rights granted by this section are *in addition* to the rights provided by G.S. 105-267" (emphasis added). (App. GG). *See Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959) (Sections 266.1 and 267 provide *alternative mechanisms* to obtain a tax refund). A "clear and certain" remedy can hardly be grounded on the expectation that taxpayers will assume error in Department publications which specify the period for seeking refunds, especially when the publications are consistent with the language of the tax statutes themselves.

North Carolina's use of Section 267 to require individual demands as a predicate for a class action magnifies the injustice inherent in its use of the statute to bar Petitioners' claims. Requiring more than 140,000 taxpayers to separately jump through all of the state's meaningless hoops in each of the four years in question in order to protect their *federal* rights is nonsense. Even if the state used the demand rule as a fiscal planning tool (which it did not), how can a "class demand" pursuant to court order on behalf of 140,000 taxpayers not suffice to put the state on notice? Would North Carolina seriously have preferred to "administer" 140,000 claims annually, especially given the Department's state of preparedness? The "individual demand" should be recognized for what it is -- the ultimate guarantee that the state will keep all that it wants of what it wrongfully took.

The Department's imposition of previously unpublished form and content requirements *after* receiving Petitioners' class demands changed the rules once the game was over. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a state may

not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it"). In sanctioning this conduct, the court below elevated form over substance to a degree not contemplated by *McKesson* and in direct contravention of *Brinkerhoff*. *See also Londoner v. Denver*, 28 S. Ct. 708, 714 (1908) ("In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form").[31]

The court below also applied Section 267 to retroactively bar Petitioners from seeking relief. This Court has plainly held that "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law." *Harper*, 113 S. Ct. at 2519. The court below deprived Petitioners of the benefit of this Court's retroactivity holding in *Harper* by requiring Petitioners to complain, as early as 1986 and *before* a right to relief was clearly established by this Court in *Davis*.[32] Because Petitioners did not foresee, during tax years 1985 through 1987, this Court's *Davis* decision (an event which Respondents successfully argued in the

---

[31]In *Londoner*, this Court further stated: "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal . . . . It is apparent that such a hearing was denied to the plaintiffs in error." *Id.* at 714. North Carolina likewise denied Petitioners *any* hearing.

[32]Even had Petitioners complained within thirty days of paying unconstitutional taxes in 1985 through 1987 (before *Davis*), Petitioners would have received no relief from the Department. (App. T; App. V, pp. 187-88).

Fourth Circuit Court of Appeals that they could not have foreseen[33]), and despite this Court's mandate to apply *Davis* retroactively, the state court below slammed shut the door to its courthouse.

All of this confusion and inequity occurs in North Carolina only when a taxpayer challenges a tax as unconstitutional or illegal. North Carolina provides clear, and more favorable, remedies to taxpayers who mistakenly pay too much tax or who complain about administrative interpretations of North Carolina's tax laws.[34] If Petitioners had made mistakes in calculating their taxes or were over-taxed because of bureaucratic misinterpretation of North Carolina's tax laws, refunds would have been available. (App. GG). Such a scheme discriminates against a federal right.[35]

The North Carolina Supreme Court's application of Section 267's "demand and wait" rule did *not* afford Petitioners the clear, certain and meaningful remedy guaranteed by due process. *Harper* is clear. Respondents must cure their discrimination by (1) taxing the state retirees retroactively, or (2) giving Petitioners full refunds. *See Harper*, 113 S. Ct. at 2519-20.[36] Despite the twin mandates of

---

[33]*Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992). *See also Bailey v. State*, 412 S.E.2d 295, 305 (N.C. 1991) ("We will not hold public officials of this state to more perfect knowledge of the law than is apparent in appellate court reports").

[34]*Coca-Cola v. Coble*, 238 S.E.2d 780, 782-83 (N.C. 1977); *Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959).

[35]*See Felder v. Casey*, 487 U.S. 131, 141-42 (1988); *Pickett v. Brown*, 462 U.S. 1 (1983); *Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Republic Pictures Corporation v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757 (1946); *McKnett v. St. Louis & S. F. Railway Co.*, 292 U.S. 230, 234 (1934).

[36]*See also Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Commission*, 868 P.2d 796 (Utah 1993, amended January 13, 1994); *Strelecki v. Oklahoma Tax Commission*, 1993 WL 379008, ___ P.2d ___ (Okla. 1993), *opinion on reh'g*, 1994 WL 102224 (Okla.

Harper and *McKesson*, Respondents neither provided full refunds to Petitioners[37] nor imposed a retrospective tax on state retirees. They instead established a procedural morass as a futile condition precedent to Petitioners' lawsuit, labelled it an exclusive "post-deprivation *remedy*," waited ninety days, and denied Petitioners' claim.

The conduct described herein is sanctioned by the very same state supreme court which recently subscribed to the proposition that:

> A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and *no statute affords an adequate remedy under a particular fact situation*, the common law will furnish the appropriate action for adequate redress of such grievance.

Corum v. University of N.C., 413 S.E.2d 276, 289, *cert. denied*, 113 S. Ct. 493 (N.C. 1992) (emphasis added).

1994); *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Hawaii 1994); *Marx v. Broom*, 632 So.2d 1315, 1994 WL 52850 (Miss. 1994); *Cambridge State Bank v. James*, ___ N.W.2d ___, 1994 WL 106516 (Minn. 1994).

[37]Respondents oft-point to a small fraction of taxpayers receiving refunds for tax year 1988 alone to suggest that relief was available had Petitioners simply followed the "rules." However, that the Department, post-*Davis*, applied Section 267 in a manner which severely and arbitrarily restricted relief (as opposed to blatantly denying relief to all) neither excuses nor erases Respondents' failure to create in hindsight a nondiscriminatory tax scheme. Given the court below's view of the Department's power respecting constitutional issues, the source of the authority to provide this small number of refunds remains a mystery. Even so, demands for refunds prior to *Davis* were not honored. (App. V, p. 187-88).

For all practical purposes, North Carolina blocked retroactive application of *Davis*. Allowing this result to stand converts *dicta* of *McKesson* from guidance on protecting legitimate state interests in sound fiscal planning into a primer on enacting unconstitutional taxes with impunity. Granting *certiorari* will allow this Court to prevent distortion of *McKesson*, to remedy North Carolina's conceded violation of Petitioners' freedom from discriminatory taxation, to correct the additional denial of due process to Petitioners caused by North Carolina's refusal to provide meaningful backward-looking relief, and to ensure that other states fully comply with *Davis*, *Harper* and *McKesson*.

2. In failing to give preclusive effect to a prior federal district court order, the court below violated principles of federalism and supplanted federal preclusion law with its own definition of collateral estoppel. Fundamental to relations between state and federal courts is mutual respect for the judgments of one another. Such respect is essential to the fair and efficient functioning of our system of justice. Failure by a state court to accord proper preclusive effect to a prior federal court judgment violates well-established principles of federalism. *Watkins v. Resorts Intern. Hotel & Casino*, 591 A.2d 592 (N.J. 1991). This Court accordingly has long held that it has jurisdiction to review state decisions dealing with the preclusive effect of federal judgments.[38] "[W]hether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank v. Frankfort*, 191 U.S 499, 514-15 (1903).

Whatever freedom state courts may enjoy to define their own law of *res judicata* and collateral estoppel, such freedom does not

---

[38]*Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 146 (1887); *Myers v. International Trust Co.*, 263 U.S. 64, 69 (1923); *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).

include defining the preclusive effect of a federal court order. Federal law applies to this determination, even in state courts. *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324 n.12 (1971).

Nonetheless, after a glancing review of its state law, the court below refused preclusive effect to a prior federal order issued in the companion federal case. (App. A, pp. 20-21). That order found Section 267 was not plain, speedy, efficient, clear, certain, adequate or complete. (App. G, pp. 71-72, 74). Because the federal district court previously stated that "final judgment has not been issued in this case and . . . this court has never ordered that this case be closed," the state court below found the "finality" element of collateral estoppel lacking. (App. A, p. 21). Thus, the court held that *final judgment on the merits* in applying the doctrines of both *res judicata* and collateral estoppel is required before a federal court decision will be accorded preclusive effect in North Carolina. *Id.*

Under federal law, "finality" for purposes of issue preclusion is more flexible than for purposes of appeal or for *res judicata*. *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3rd Cir. 1980); *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979). The federal definition of "finality," applied by the vast majority of Circuit Courts of Appeal addressing the issue, is:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291 [final decision on the merits], ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

O'Reilly v. Malon, 747 F.2d 820, 823 (1st Cir. 1984).[39] In the present case, the federal order was entered after extensive argument[40] by both parties, was not avowedly tentative, and was appealable.[41] Thus, the order was "sufficiently firm" to be "final" under federal collateral estoppel law. The court below therefore erred in failing to apply the proper law.

Because the federal court found Section 267 neither plain, speedy and efficient for purposes of the Tax Injunction Act, 28 U.S.C. § 1341, nor clear, adequate and complete for purposes of comity, Section 267 necessarily is not clear and certain for purposes of federal due process and can *never* satisfy due process standards.[42] The common denominator between the Tax Injunction Act and the

---

[39]*See also Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2nd Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3rd Cir. 1980); *Swentek v. USAir, Inc.*, 830 F.2d 552, 561 (4th Cir. 1987); *Employees Own Federal Credit Union v. City of Defiance, Ohio*, 752 F.2d 243, 245 (6th Cir. 1985); *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 394 (7th Cir. 1986); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 563-64 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991); *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983); *Block v. U.S. International Trade Commission*, 777 F.2d 1568, 1572 (Fed. Cir. 1985); *contra, Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1271 n.7 (5th Cir. 1986).

[40]In concluding that the matter was "ripe for ruling," the federal court observed that "the parties have extensively briefed the issues" and "the court has conducted a lengthy hearing." (App. G, p. 68).

[41]28 U.S.C. § 1292(b). Respondents' choice not to appeal the federal order is immaterial, as is the Fourth Circuit Court of Appeals' discretion to deny the appeal. The general rule denying preclusive effect to an unappealable order "does not apply in cases [such as the case at bar] where review is available but is not sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied; such denials by a first tier appellate court are generally tantamount to a conclusion that the questions raised are without merit." Restatement (Second) of Judgments § 28 (1982).

[42]For the opposite side of this coin, *see Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484, 1496 (N.D. Ga. 1993).

Due Process Clause is that states must provide taxpayers a full hearing and judicial determination at which they may raise any and all constitutional objections.[43]

In finding the Tax Injunction Act inapplicable, the federal court determined that North Carolina failed to provide Petitioners with the opportunity for a hearing and judicial determination at which they could raise their constitutional objections to the discriminatory taxation of their federal pay. *Rosewell*, 450 U.S. at 514; (App. G, p. 71). *A priori*, Petitioners established, and the federal court determined that North Carolina did not provide "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" -- a due process violation. *McKesson*, 496 U.S. at 39. Thus, had it given the federal order proper preclusive effect, the court below could not have concluded that Section 267 provided due process.

Review of North Carolina's violation of federalism principles by applying a result-oriented collateral estoppel definition is necessary to uphold the fundamental precept that states must respect, not disregard, federal court decisions. If state courts can eviscerate federal orders by applying state preclusion law, federal courts will no longer provide a reliable forum to adjudicate federal claims. The opinion below rejects "the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution . . . . " *Deposit Bank v. Frankfort*, 24 S. Ct. 154, 162 (1903). Accordingly, *certiorari* should be granted.

---

[43]Compare this Court's discussion of the Tax Injunction Act standard in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981) (A plain, speedy, and efficient remedy is one that provides a "taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax") (internal quotations omitted) with the due process discussion in *McKesson*, 496 U.S. at 39 n.22 ("The fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'" In the context of state taxation where no pre-deprivation remedy exists, due process requires a state to provide not only "a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

CONCLUSION

Left intact, the decision below will signal to North Carolina, and other states as well, that meaningless procedural requirements will avoid retroactive application of this Court's decisions on the constitutionality of state tax laws. It will also signal that, when federal district courts are forced to intervene, states will be able to ignore them. With such a free hand to impose unconstitutional taxes (because the only practical risk is prospective repeal of the offending statute), states will have little incentive to ensure that their tax laws are constitutionally sound. Equally significant, citizens will be forced to suffer unconstitutional taxation with no hope of a meaningful remedy.

Therefore, and for all of the foregoing reasons, Petitioners respectfully request that this Court issue a writ of *certiorari* to the Supreme Court of North Carolina.

Respectfully submitted,

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields, III
Lawrence Pierce Egerton
Kimberly C. Stevens

Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064
Attorneys for Petitioners

*Counsel of Record
May 23, 1994